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2016 – Study Question (Designs)

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Requirements for protection of designs

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I. Current law and practice

- 1) Does your Group's current law provide for an intellectual property right (registered or patented) that specifically protects the outward appearance or ornamentation of an object or article of manufacture?

As set out in the Study Guidelines, copyrights and trademarks are not such rights in the context of this Study Question.

yes

Please explain:

In Belgium, two legal regimes may apply to registered designs: (i) the Benelux Convention on intellectual property (hereafter "BCIP"), implementing a.o. the Directive 98/71/EC on the legal protection of designs (hereafter "Community Design Directive" or "CDD") in Benelux law and (ii) the Council Regulation 6/2002 on Community Designs (hereafter "Community Designs Regulation" or "CDR").

Protection is granted to the appearance of the whole or a part of a product, which appearance of a product results from the features, in particular the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation (Article 3.1 BCIP, Article 3.a CDR and Article 1.a CDD).

- 2) If yes, what is this right called? (e.g. registered design, design patent, industrial design, industrial design patent)

References to design below are to be read as references to this right, irrespective of what it is called in your jurisdiction.

Design (“*dessins et modèles*” in French and “*tekeningen en modellen*” in Dutch).

In compliance with the Guidelines, this report does not deal with the unregistered Community design but it can be noted that as regards validity requirements and functionality the regime of such design does not differ in essence from the regime of the registered Community and Benelux designs.

- 3) What are the statutory requirements for such right? Please tick any relevant boxes and explain the basis and application of these requirements.

a) novelty

1. Novelty: a design shall be considered new if no identical design has been made available to the public before the date of filing of the application or the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details (Article 3.3 BCIP, Article 5 CDR, Article 4 CDD). On the basis of the design heritage or the design corpus, it must be assessed whether an identical or immaterially different design has already been disclosed to the public. The appearance of the design as a whole is compared to older designs individually. To fulfill the novelty requirement it suffices that the design differs by non-material details. As mentioned earlier, two designs are considered identical if the characteristics of the designs are only different with respect to immaterial details. In that regard, the General Court of the European Union decided that details which are not immediately observable will not create a different or novel design.[1][#_ftn1] The Court stated later that differences cannot be considered to be immaterial details if they are perceptible when the earlier design and the contested design are placed side by side.[2][#_ftn2]

[1][#_ftnref1] GCEU 6 June 2013, T-68/11, *Erich Kastenholtz v. OHIM*, § 37.

[2][#_ftnref2] GCEU 28 January 2015, T-41/14, *Argo Development and Manufacturing Ltd v. OHIM*, § 23.

b) non-obviousness

c) inventive step

d) individual character

Individual character: a design shall be considered to have an individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing or the date of priority. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration (Article 3.4 BCIP, Article 6 CDR, Article 5 CDD)

It must be assessed whether the design creates a “sufficiently”^[1] clear different overall impression upon the informed user in comparison to the design corpus. With other words, the designer must have performed a creative act to distinguish his/her design from the existing designs of the design heritage.

The individual character of a design consists of a different general impression or the lack of a “*déjà-vu*”-feeling. An analytical comparison or an enumeration of differences and similarities does not suffice: a global comparison of the contested design and the opposed design is decisive.

The European Court of Justice has recently ruled that the general impression does not concern a combination of separate features of different older designs, but it requires rather the analysis and comparison with individual older designs as a whole one by one.^[2]

Finally, it should be noted that the requirement of individual character is assessed on the basis of the overall impression the design produces on the informed user. The concept of the informed user may be understood as referring, not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question.^[3]

^[1] “Sufficiently” is mentioned in the preamble of the Design Regulation, but not in the text of the Regulation itself.

^[2] ECJ 19 June 2014, C-345/13, *Karen Millen v. Dunnes Stores*, § 3.

^[3] A.o. ECJ 20 October 2011, C-281/10, *Pepsico Inc / Grupo Promer Mon Graphic SA*, §§ 53-54.

e) originality

f) aesthetic

g) ornamental

h) other, namely ...

4) Does your Group's current law deny design protection to a design with an appearance that is dictated solely by its function?

yes

Please explain:

The design (rights) “shall not subsist” in those features of the appearance of a product which are solely dictated by its technical function (Article 3.2 BCIP (“Sont exclus de la protection”), Article 8 CDR, Article 7 CDD). It should be noted here that such statutory exclusion relates to the features of appearance of the product and not to the design as a whole. In the EUIPO case law, it is only when all

essential features are solely dictated by the technical function that the design as a whole is invalid^{[1][#_ftn1]}. Art. 25, § 1, letter b) and § 6 CDR provides for a partial invalidation if the design concerned can be maintained in an amended form when in that form it complies with the validity requirements and its identity is retained.

^{[1][#_ftnref1]} A.o. EUIPO, 12 February 2015, R998/2013-3; EUIPO, Third Board of appeal, 12 November 2009, case R1114/2007-3, § 17, and the decision of 22 October 2009 referred to hereinafter.

- 5) If yes, what are the relevant factors to determine whether or not a design is deemed unprotectable as being functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

Introduction :

No clear and definite test to determine whether or not a design is deemed unprotectable as being functional has been provided by the current legislation and existing case law; legal scholars have different views as well. Of the few cases that have been brought before the Belgian courts and published, the courts have applied both (i) the “*multiplicité des formes*”-test in some cases^{[1][#_ftn1]} (see point c) hereinafter), which test is seen by many as close to the Dutch so-called “result test”, and (ii) a test seen as close to the Dutch so-called “apparatus test” in other cases^{[2][#_ftn2]} (see points a) and b) hereinafter). We will further explain the differences between both theories below. The practical results of these two approaches (tests) will probably not be very different although the “apparatus” theory might be seen as more likely to deny protection.

On the other hand, in many decisions^{[3][#_ftn3]}, the Board of Appeal of the EUIPO (formerly OHIM) has expressly rejected the “*multiplicité des formes*”-test as inapplicable and inapt to determine the technical character of a design. The EUIPO seemed thereby to have proposed the use of a test rather close to the “apparatus test” in order to assess the technical function of a design.

Belgian case law hesitates between these two approaches.

It is to be noted that as an *obiter dictum* in the *Senz* judgment, the General Court explained that although the feature might serve an important technical function, it does not necessarily imply that its design is dictated entirely by its technical function. The feature might indeed have different dimensions and colours and could, depending on their size and shape, attract visual attention.^{[4][#_ftn4]}

^{[1][#_ftnref1]} Brussels 12 May 2014, *Wibra België NV / Hansgrohe AG*, A.R. 2010/AR/1032, not published, p. 23

[2][#_ftnref2] President of the Court of Commerce of Brussels 4 August 2015, *Grosfillex SAS / Dumaplast NV*, A.R. 2015/00011.

[3][#_ftnref3] Board of Appeal OHIM, 22 October 2009, R 690/2007-3 ; Board of Appeal OHIM, 12 November 2009, R 1114/2007-3 ; Board of Appeal OHIM, 29 April 2010, R 211/2008-3 ; Board of Appeal OHIM, 14 April 2014, R 1770/2012-3.

[4][#_ftnref4] GCEU 21 May 2015, T-22/13 and T-23/13, *Senz Technologies BV / OHIM*, §§ 67-68.

Answer to 5 a) :

Yes insofar as the design as a whole is concerned.

This approach is often called the so-called “apparatus test” in the Belgian legal literature. It considers that a feature is solely dictated by the technical function if the technical function is the only relevant factor in the shape of the features (the design has no “eye appeal”, does not enhance the visual appearance). In this test, the existence of functionally equivalent alternatives is not determinative.

Such assessment can be made either on the basis of a global, synthetic analysis (**a**) by looking at the overall appearance and function of the product, or on the basis of analytical analysis (**b** hereinafter), whereby the function of each feature must be assessed individually.

In this regard, the Belgian case law is neither uniform nor clear. Moreover, Belgian courts do not make a clear distinction between option (a) and option (b). Both appear to be used for determining whether the design is solely dictated by a technical function.

However, it appears to be generally accepted when the court examines the design as a whole, that “the technical function” at stake relates to the overall product as such, and not to the functions of the separate features of the product.

b) whether each portion of the overall appearance is dictated solely by its technical function

The Belgian group refers to what has been explained under letter (a): Belgian case law does not make a clear distinction between these options (a) and (b). In addition, when the court analyses the features individually, it is unclear whether the function of the feature at hand or the function of the product is seen as relevant in the Belgian case law.

c) the availability of alternative appearances that can obtain the same functional result

This approach is often called the “result test” in the Belgian legal literature (although not identical to what in the Netherlands (wherewith the notion originates) some legal scholars define as the “result test”). The “*multiplicité des formes*” approach considers that a feature is not solely dictated by the technical function when one functionally equivalent form exists. In a more restrictive approach, the functionally equivalent feature must be available, in particular outside the scope of protection of the contested design and not otherwise monopolized. In such approach the degree of freedom of the designers in view of *i.a.* the technical function of the product is to be taken into consideration when

defining the required individual character (Article 6.2 CDR) while the same applies to the scope of protection (Article 10.2 CDR).

- d) the need to achieve the product's technical function was the only relevant factor when the design in question was selected

This can also be a relevant factor in the assessment.

This approach is applied by the EUIPO (*cf. supra*).^[1] In this regard, the EUIPO does not impose very strict requirements to grant protection to a design. According to the EUIPO it must be analyzed what went on in the designer's mind when designing the product and whether any other than purely function features *could have been* relevant. Protection is thus only excluded if a reasonable observer would come to the conclusion that the technical product features were chosen *exclusively* for the purpose of designing a product that performs its function, as opposed to features that were chosen, *at least to some degree*, for the purpose of enhancing the product's visual appearance.^[2] Said differently, only when aesthetic considerations are completely irrelevant, and thus no other than purely functional considerations were relevant when choosing a specific feature, the design will be solely dictated by the need to achieve a technical solution, and thus excluded from protection.^[3]

By rejecting the "*multiplicité des formes*"-test, such approach is close (but not identical) to the so-called "apparatus test" (the notion originates also from The Netherlands), under which a design is excluded from protection when the functionality of the product (apparatus) prevails, the design does not have any "eye appeal" for the purpose of enhancing the visual appearance and the only function of the design is to serve the product's function; the existence of functionally equivalent alternatives is then irrelevant.

It should be noted however that some recent decisions of EUIPO indicate that consideration is given to possible alternative forms (features)^[4]; such approach is not inherently incoherent with the approach commonly used by EUIPO because it can help the examiner or the judge in assessing whether a feature has been chosen, at least to some degree, for the purpose of enhancing the visual appearance (the existence of possible alternative appearance features can be regarded as an objective indicator of such purpose).

[1] A.o. Board of Appeal OHIM, 22 October 2009, R 690/2007-3 ; Board of Appeal OHIM, 12 November 2009, R 1114/2007-3 ; Board of Appeal OHIM, 29 April 2010, R 211/2008-3 ; Board of Appeal OHIM, 14 April 2014, R 1770/2012-3.

[2] Board of Appeal OHIM 22 October 2009, R 690/2007-3, *Lindner Recyclingtech GmbH / Franssons Verkstäder*, § 36.

[3] Invalidity Division OHIM 29 July 2015, R 492327-2, *Van Genechten Packaging N.V. / Colpac Limited*, §§ 24 and 30.

[4] Board of Appeal, 12 February 2015, R998/2013, *Antrotherm v. Thermo Organika*, §§ 48-

49; Board of Appeal, 8 December 2015, R 2162/2014-3, *Velekey v. Rotovill*, §§ 26-27.

e) other, namely ...

6) Does your Group's current law deny design protection to any portions (e.g. a "feature", "element") of the overall design that are deemed functional?

yes

Please explain:

Yes. When an individual feature of the design is dictated solely by the technical function, this feature is excluded from the protection owed to the design^[1]. The existing case law on this subject, however, does not provide clear guidance whether the technical function must relate to the feature itself or to the product as a whole.

^[1] See the French text of Art. 8 (1) CDR : a design "ne confère pas de droits sur les caractéristiques de l'apparence d'un produit qui sont exclusivement imposées par sa fonction technique » (in English : « shall not subsist in »).

7) If yes, what are the relevant factors to determine whether or not a portion is deemed functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

This approach is subject to various criteria (cf. b)-c) hereafter).

b) the availability of alternative appearances for the portion to obtain the same functional result

the so called "result test" (cf. *supra*).

c) the need to achieve the product's technical function was the only relevant factor when the portion in question was selected

favored by the so called "apparatus test" (cf. *supra*).

d) other, namely ...

8) What is the effect on the scope of protection of a design with one or more functional portions? Please tick any relevant boxes and explain as applicable:

a) any portions deemed functional will not be taken into account when assessing infringement

1. only those features of a design that are solely dictated by the technical function will not be taken

into account when assessing the infringement. The General Court of Justice has clarified in 2015 that it is only when one or more features of a product's appearance are dictated solely by its technical function that the Design Regulation provides that such a feature must not be taken into account for the assessing the individual character.^[1] If the features are only partially determined (dictated) by the technical function, these features must still be taken into account when assessing the scope of protection.

^[1] GCEU 21 May 2015, T-22/13 and T-23/13, *Senz Technologies BV / OHIM*, § 101.

b) any portions deemed functional will not be taken into account when assessing validity

1. the same rules apply, being here noted (as for infringement) that the degree of freedom of the designer is an important factor in the assessment of the individual character as regards the features not entirely (solely) dictated by the technical function. In case the designer of the later design disposed of a large discretion and creative freedom to develop the design, small differences between the designs will not result in a different overall impression. The informed user will pay less attention to the features of the design with respect of which the designer has a limited design freedom, for example due to the technical function of the feature.^[1]

^[1] GCEU 28 January 2015, T-41/14, *Argo Development and Manufacturing Ltd / OHIM*, § 37-48.

c) any portions deemed functional will not be taken into account separately when assessing infringement, but can play a role in the overall comparison

1. The features that are not taken into account (because of being entirely solely dictated by the technical function) will not be reconsidered for the assessment of the overall comparison when assessing infringement.

d) any portions deemed functional will not be taken into account separately when assessing validity, but may play a role in the overall comparison

1. The features that are not taken into account (because of being entirely solely dictated by the technical function) will not be reconsidered for the assessment of the overall comparison when assessing validity.

e) no effect (e.g. so long as the overall appearance is not dictated solely by its technical function, all portions of the design are included in the scope of protection, irrespective as to whether any portions may be functional)

f) the Group's current law is unsettled

g) other, namely ...

II. Policy considerations and possible improvements to your current law

9) How can the following aspects of your Group's current law be improved, if at all?

a) the definition or meaning of a "design"

The Belgian group does not necessarily propose an *improvement* of current statutory law but rather asks for an indispensable *clarification* of the following issues:

1. the starting point of the discussion is a correct understanding and definition of "design": the Belgian group proposes to clarify that, while almost all products have a technical character, the protection at stake relates only to the outward appearance of a product and not to its (possibly technical) inside structure, nor to the technical solutions implemented in the design (this should clarify the discussion of the hypothesis where the technical solution is implemented by the outward appearance itself)^{[1][#_ftn1]}.

^{[1][#_ftnref1]} In 2014, the court of appeal of Brussels seems to have considered that the technical character of the inner structure of a product resulted in the technical determination of the outside appearance of the design of the product. The Belgian group considers this reasoning to be incorrect; clarification is desired (Brussels, 4 November 2014, *Friesland Brands / Incopack*, A.R. 2011/AR/950 and 2012/AR/2401).

b) the requirements for protection of a design

1. < > requirements for protection of a design: current law provides a rather vague requirement of "individual character". It is indeed unclear what the "d  j  -vu" condition for lack of individual character implies. The judges moreover dispose of a very subjective appreciation to determine whether or not there is a distinct overall (visual)^{[1][#_ftn1]} impression. The Belgian group finds it necessary to adopt a more objective and reasoned approach.

^{[1][#_ftnref1]} The word "visual" is mentioned in the French text of the law as well as in some European case law, but not in the *i.a.* Dutch version.

c) the treatment of functionality in the sense described in paragraph 14) of the Study Guidelines or aspects of such functionality

At present it remains unclear (i) exactly what is the relevant "*technical function*" to be considered (that / those of the product, or, of the appearance) (ii) which test should be applied to determine functionality (cf. supra). Some case law applies more or less the "result test", whereas other case law applies more or less the "apparatus test". Moreover, one and the same chamber of the court of appeal has applied the "result test" in one case in May 2014^{[1][#_ftn1]} and the "apparatus test" in another

case in November 2014^[2].

^[1] Brussels 12 May 2014, *Wibra België NV / Hansgrohe AG*, A.R. 2010/AR/1032, not published, p. 23.

^[2] Brussels 4 November 2014, *Friesland Brands / Incopack*, A.R. 2011/AR/950 and 2012/AR/2401.

10) Are there any other policy considerations and/or proposals for improvement to your current law falling within the scope of this Study Question?

yes

Please explain:

III. Proposals for harmonisation

11) Does your Group consider that harmonisation in the three areas in question 9) above is desirable?

If yes to some but not all of those three areas, please state in relation to which of the areas your Group considers harmonisation is desirable.

If yes in relation to any of those areas, please respond to the following questions without regard to your Group's current law.

Even if no in relation to any of those areas, please address the following questions to the extent your Group considers your Group's current law could be improved.

yes

Please explain:

Yes, the Belgian group considers that harmonization in these three areas would be welcome.

12) Should there be harmonisation of the definition of an intellectual property right that specifically protects the outward appearance or ornamentation of an object or article of manufacture?

yes

Please explain:

Yes. As already mentioned (supra 9.a) the definition and the very object and limits of the protection ought to be reminded: the outward appearance of the product. This is needed to clarify many issues and in particular the functionality issue.

13) If so, what should that right be called?

Design.

14) What should the requirements for such right be? Please tick any relevant boxes and explain the basis and application of these requirements:

a) novelty

Yes. As already mentioned (supra 9.a) the definition and the very object and limits of the protection ought to be reminded: the outward appearance of the product. This is needed to clarify many issues and in particular the functionality issue.

Novelty should be a requirement for design protection. The Belgian group suggests to clarify the scope of this condition (territorial and personal). It should be clear in which territory (national, regional or global?) this condition should be assessed and with which group of persons (competitors, consumers, users?).

b) non-obviousness

This requirement is more related to inventions and patent protection and should thus be avoided.

c) inventive step

This requirement is more related to inventions and patent protection and should thus be avoided.

d) individual character

Individual character of the appearance should be a requirement for design protection. The Belgian Group accepts the reference to the informed user.

e) originality

This requirement is more related to copyright protection and should thus be avoided.

f) aesthetic

The Belgian group considers that this requirement is too subjective to offer legal certainty and should thus be avoided as a condition for design protection. This characteristic may however be used as a way of showing that a (feature of the) design is not dictated solely by its function: in this respect, the perceived aesthetic character of a (feature of the) design may have some legal impact.

g) ornamental

The Belgian group considers that this requirement is too subjective to offer legal certainty. This characteristic may however be used as a way of showing that a (feature of the) design is not dictated solely by its function: in this respect, the perceived ornamental character of a (feature of the) design may have some legal impact.

h) other, namely ...

15) Should design protection be denied to a design with an appearance that is dictated solely by its

function?

yes

Please explain:

- 16) If yes, what should the relevant factors be to determine whether or not a design is deemed unprotectable as being functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

The Belgian group considers that both (a) and (b) should be the main factors when assessing whether or not a design should be unprotectable. When assessing the product as a whole, also the assessment of all the individual features of the overall appearance (b) is useful. However, the criterion “solely dictated” remains vague and subjective. A clarification is therefore indispensable.

In the end, a global approach of the design as such should be preferred over a fragmentation of the various characteristics of the design. The Belgian group therefore stresses that the “function” to be taken into account should be the function of the product as such. It is that function that should be considered for assessing the validity of the design as a whole and not the functions of each individual features. If factor b) hereinafter refers to the technical function of the feature as such, then the Belgian group would consider this factor inapt to determine whether or not a design is deemed unprotectable.

Furthermore, for the invalidity of an entire design, it is insufficient that all features individually would be solely dictated by the technical function of the product as such, but moreover the overall product as a whole (combination) must be solely dictated by its function.

However, what criterion should be applied is still unsettled (cf. infra).

b) whether each portion of the overall appearance is dictated solely by its technical function

cf. our response to (a).

c) the availability of alternative appearances that can obtain the same functional result

Although this criterion seems rather easy to apply, the Belgian group is unsettled whether this is a relevant criterion. Some case law (to which some members of the Belgian group adhere) considers that the existence of alternative appearances shows that the appearance as such (the only subject-matter of the protection) of the product at hand is not merely or entirely functional. The question however arises whether the “alternative” appearance should fulfill the same function (identical functional result) (narrow approach) or whether a “similar” result would be enough for the existence of an alternative (such approach is generally not favoured by the Belgian group because of making the exclusion very exceptional)[1][#_ftn1] . It should in any case be stressed that “availability” should be construed not only from a technical or practical point of view, but also from a legal point of view (i.e. the alternative should not fall within the scope of protection of the design at hand).

As discussed above, some other case law (close to EUIPO's case law and to which some other members of the Belgian group adhere) considers this criterion not relevant and considers that only the functional character of the features and/or the design as a whole should be assessed, and that the existence of equivalent alternatives can at best serve as one element (among others) of consideration in the wider appreciation of the technical determination of the design at hand.

In any case, the Belgian group would favour a clarification as to the interpretation of this criterion. Also in other national jurisdictions of the European Union, where this approach is adopted, diverging interpretations are adopted.

[1][#_ftnref1] In this regard a Dutch appeal decision is worth mentioning where a distinction is suggested between the technical effect and the technical solution (Court of appeal The Hague, 29 March 2016, ECLI :GHDHA :2016 :928, *Koz Products v. Adinco*, § 12) (the whole ruling was not discussed in the Belgian group but the distinction was noted as helpful in the debate).

- d) the need to achieve the product's technical function was the only relevant factor when the design in question was selected

This criterion can be accepted, provided if it is strictly applied as formulated by EUIPO. Legal certainty can only be provided if the requirement to grant protection is literally whether something *might* have been considered at some degree to enhance the visual appearance. An objective approach at the end of the day is needed and in this respect, as it appears from some recent EUIPO case law, the *multiplicité des formes*-approach, although rejected as such, might play a role in the assessment.

- e) other, namely ...

- 17) Should design protection be denied to any portions (e.g. a "feature", "element") of the overall design that are deemed functional?

yes

Please explain:

Yes while noting that the protection at stake relates to the design as a whole (as registered) and not to features so that denying the protection to functional features means that such features are not considered in comparing the registered design and the allegedly infringing design.

In other terms, to the extent that a feature of a design is considered entirely technical, it should not be taken into account when determining the scope of protection of the design.

- 18) If yes, what should the relevant factors be to determine whether a portion of a design is functional? Please tick any relevant boxes and explain as applicable:

- a) whether the overall appearance is dictated solely by its technical function

The Belgian group considers that the technical function of the feature itself, is not relevant for determining whether or not the feature or the design as a whole are deemed unprotectable.

b) the availability of alternative appearances for the portion to obtain the same functional result

c) the need to achieve the product's technical function was the only relevant factor when the portion in question was selected

1. *cf. 16, sub d)*

d) other, namely ...

19) What should the effect be on the scope of protection of a design with one or more functional portions? Please tick any relevant boxes and explain as applicable:

a) any portions deemed functional will not be taken into account when assessing infringement

Under EU and Belgian case law, to which the Belgian group adheres, the features deemed entirely functional are not taken into account when assessing infringement. This seems in line with the objective of the exception as technically dictated elements should not be monopolized under design rights.

b) any portions deemed functional will not be taken into account when assessing validity

Mutatis mutandis as sub a).

c) any portions deemed functional will not be taken into account separately when assessing infringement, but can play a role in the overall comparison

The Belgian group considers that features deemed entirely functional cannot be taken into account, not even in the overall comparison as this may have as effect that a monopoly would be granted to functional parts of the design.

Features partially determined by the technical function can be taken into consideration but will play a role in assessing the degree of freedom of the designer, which degree of freedom will have an impact on assessing the infringement (lack of individual character) of the second design.

d) any portions deemed functional will not be taken into account separately when assessing validity, but may play a role in the overall comparison

Mutatis mutandis as sub c).

e) no effect (e.g. so long as the overall appearance is not dictated solely by its technical function, all portions of the design are included in the scope of protection, irrespective as to whether any portions may be functional)

It should have an effect, as explained hereinbefore. Entirely functional features should not be taken into consideration. However as regards the protection of the design as a whole, the circumstance that some or even all features are entirely technically determined may in some cases not deprive the whole design of the protection when the combined appearance as such of the features (technically determined or not) is not entirely dictated by the function of the product.

f) the Group's current law is unsettled

g) other, namely ...

20) If your answer to question 11) is no, is it your Group's view that a (registered or patented) intellectual property right that specifically protects the outward appearance or ornamentation of an object or article of manufacture should not be available at all?

yes

21) If yes, why?

N.A.

22) If your answer to question 11) is no in relation to some but not all of the three areas set out in question 9) above, please state why your Group does not consider that harmonisation in that area(s) is desirable.

N.A.

23) Please comment on any additional issues concerning any aspect of the definition and requirements for protection of designs, or the role of functionality, you consider relevant to this Study Question.

With respect to the distinction made between the function of the design as a whole and the function of a feature of the design, the Belgian group emphasizes that the function of the design as a whole should be the sole factor to be taken into account when assessing whether a design or any portion of it is solely dictated by its technical function.

Please indicate which industry sector views are included in part “**III. Proposals for harmonization**” of this form:

Summary